



**Kaiserslautern Legal Services Center
Legal Assistance Information**

**Commercial Solicitation
Sales & Purchases
in Germany**



This information paper provides basic information only, and is not intended to serve as a substitute for a personal consultation with a Legal Assistance Attorney. For an appointment to see an attorney, dial DSN 483-8848 or Civilian 0631-411-8848.

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I. INTRODUCTION

a. Germany is a civil law country whereas the USA is a common law country. Consequently, the German laws are all codified. In Germany the German Civil Code (Bürgerliches Gesetzbuch – BGB) governs most legal transactions. It consists of 5 books with a total of more than 2,385 sections.

b. Many German consumer protection laws are based on EU Directives, which are published in all the languages of the EU; English being one of them (http://europe.eu/index_en.htm). Therefore, you can also look up part of the applicable law in English, e.g., Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ No. L 171, 07 July 1999, p. 12.

II. CONTRCATS

A. Verbal and Written Contracts

a. Verbal contracts are binding and enforceable right away. According to German law, there is no requirement for consideration in the formation of a contract. All you need is a meeting of the minds based on an offer and acceptance. You do not even need to address all issues of the deal because sometimes the written law will fill in the gaps.

b. Written contracts are preferable. Under verbal contracts parties tend to remember their obligations a little differently after a while. Therefore, verbal contracts are only useful for on the spot transactions. Under a written contract, however, the contractual parties know their obligations and warranty claims can be easier asserted.

c. Signing contracts, drafted in German, can be risky unless you are familiar with the language. It is almost impossible to get out of a contract simply because you did not know or understand what you signed. Instead of relying on the seller's interpretation and summarization of the German contractual terms, you may consult an unbiased person who knows the language and/or the law, e.g., see your Legal Assistance Office. Furthermore, do not be afraid to write down in the contract the translation that the seller gave you and have him sign it before you sign the contract, so that the two of you have identical copies of the contract. You should always ask for a copy of the contract.

B. Consumer Contracts

1. Basics

a. In order to qualify for a consumer contract, the seller has to be someone selling consumer goods under a contract in the course of his trade, business or profession to you as a consumer.

b. In the case of non-conformity of the goods with the contract, the consumer is entitled to have the goods restored to conformity with the contract free of charge, choosing either repair or replacement, or, failing this, to have the price reduced or the contract rescinded (§ 437 BGB). Therefore, the primary remedies are repair or replacement, unless those remedies are impossible or disproportionate (§ 439 BGB). The repair or replacement shall be completed within a reasonable time and without any significant inconvenience to the consumer, taking account of the nature of the goods and the purpose for which the consumer required the goods. Absent special circumstances, the seller has only two attempts to repair the goods (§ 440 BGB).

c. The consumer is not entitled to have the contract rescinded if the lack of conformity is minor (§ 323 para. 5, § 281 para 1 BGB) but may reduce the purchase price (§ 441 para. 1 BGB). Furthermore, any reimbursement to the consumer may be reduced to take account of the use the consumer has had of the goods since they were delivered to him, provided the consumer has been advised in writing about such obligations and how to avoid them (§ 357 para. 3 BGB).

d. The specific nature of second-hand goods makes it generally impossible to replace them. Therefore, the consumer's right of replacement is generally not available for these goods.

e. **BURDEN OF PROOF.** Any lack of conformity which becomes apparent within six months of delivery of the goods shall be presumed to have existed at the time of delivery unless proved otherwise or unless this presumption is incompatible with the nature of the goods or the nature of the lack of conformity (§ 476 BGB). Nevertheless, the consumer will still have to show, she/he did not cause it.

2. Statute of Limitations

a. **NEW GOODS.** The seller is only liable for conformity of the goods for two years beginning at the time of delivery (§ 438 BGB). After that period the consumer loses any and all rights he/she might have had to exercise his warranty claim.

b. **USED GOODS.** The Statute of Limitations for used goods shall not be shortened to less than one year (§ 475 BGB).

c. In the event of repair, replacement or negotiations between seller and consumer with a view to an amicable settlement regarding any lack of conformity issue, the Statue of Limitation is tolled (meaning stopped for the period and resumed again when negotiations or remedies fail).

C. "Private" Contracts

Please note, that many rules on consumer contracts do **not** apply to contracts, where the seller's actions are not related to his trade, business or profession. If you are buying from a private person, all warranties can be excluded by using clauses like "sold as is" or "with all faults" or "gebraucht wie gesehen".

D. How to cancel a contract

a. Generally contracts are binding and enforceable right away and, therefore, **cannot** be canceled!!!

b. The only contracts allowed to be cancelled are those fulfilling the requirements specified in:

- § 312 BGB (Door-to-Door Sales Transaction w/o Invitation)
- § 358 BGB (Financed Sales & Distance Contracts)
- § 485 BGB (Rights to use Immovable Properties on a Timeshare Basis)
- § 495 BGB (Consumer Credit)
- where the parties agreed on a cancellation clause and put it in writing in the contract

c. Look to your contract and read the cancellation clause carefully. According to German law, verbal cancellation notices are invalid! Instead the cancellation notice must be in text form, e.g., letter, fax, email or SMS (§ 355 BGB). Furthermore, it must be sent off within 2 weeks of signing the contract. It is of no relevance when the seller actually receives the cancellation notice just as long as it was sent within the 2-week deadline. However, the burden of proof for sending it off in time is on the buyer. If the consumer already received the merchandise within the 2-week-period, he may – alternatively - return the merchandise within the cancellation period.

d. However, even in cases where the German law does not require a cancellation clause, you may, nevertheless negotiate for such a cancellation clause and have it added to the contract in writing. It is just a matter of how sure you feel about the deal and whether you would prefer to have a cooling off period or not.

III. LEGAL TRAPS

A. Claim for Damages against the Buyer

a. Any unjustified attempt to get out of a contract concluded with a businessperson will result in a claim for damages (loss of profit) on the side of the seller. Generally, the sum demanded in damages for loss of profit amounts to 25%(!) of the purchase value! It is a flat percentage rate that is due without any further proof. In fact, legal fees may be added where the buyer refuses to pay a justified claim for damages.

b. The following examples are **not** sufficient reasons to terminate a contract:

- I did not understand the language
- I did not know what I was signing
- I saw something cheaper somewhere else
- Lack of financial means
- Commercial solicitor has no USAREUR Solicitation Permit

c. If you can sufficiently prove that someone deceived you or maliciously tricked you then you have a good reason to terminate the contract. The same is true if the seller breaches his/her warranty obligations or fails to perform the promised act.

B. Sales Tactic Examples

1. Furniture Contracts

a. Do you buy cars out of a catalog? There are plenty of furniture stores around in the Kaiserslautern area where you can actually see the merchandise before you decide whether to buy it or not. Contrary to furniture stores on the economy, solicitors specifically target American customers and are cunning in their sales techniques.

b. In Germany, delivery dates in the original contract are never specific and are seldom kept. Generally, the seller estimates how long it may take for him to get the ordered goods. Therefore, the contract is not automatically breached if the goods are not delivered within that estimated time frame. If time is of the essence, you should put that in the contract and also request a specific delivery date be put in the contract. For example, state a specific date (in writing!) after which you will no longer accept delivery of the goods. Termination notices must be for good reason and in writing, otherwise you may subject yourself to a claim for damages because of breach of contract.

c. Moreover, be aware that there are no solid oak Shranks sold. The most one can expect are solid oak fronts. The rest of the Shrank likely consists of pressed wood and is produced abroad where labor costs are cheap. Do not be deceived!

2. Painting Contracts

a. Has anyone ever offered to sell to you an original painting for \$1,500? What are you really being offered? Webster's New Riverside University Dictionary defines the term "original" as "an authentic work of art, as distinguished from an imitation or reproduction". Therefore, the seller only warrants that it is hand made and not a photocopy or other mechanical mass production. In that sense it is unique because no human painter can draw two completely identical paintings. Therefore, each painting will be slightly different, even though the distinctions may be tiny and only visible to art experts. Thus the seller does not promise you that he will not sell paintings just like yours. On the contrary, that is exactly what the seller does! In fact the painter most likely spends his day painting the same scenery over and over again. Therefore, you should only buy the painting at the offered price if the painter has a great future and is likely to become a new Picasso so that his work increases in value later on.

IV. SALE AND PURCHASE OF (USED) CARS IN GERMANY

A. Contract and Conformity

a. Salespersons are usually very eloquent. It is part of their profession. Most of their statements are only sales talk and no binding promises, unless you can prove, *e.g.*, by putting that promised stipulation into the written contract. In fact all terms should be reduced to writing and signed by the parties because the written contract is presumed to be correct, complete and without binding oral (side) agreements.

b. A car is presumed to be in conformity with the purchase contract if it complies at the time of delivery with the agreed upon nature of the goods. In consumer contracts the passing of the risk occurs upon actual delivery or when in default in taking delivery, even in sale to destination situations (§ 474 para. 2 BGB). Where used/second-hand goods are sold, the comparative standard is also used/second-hand goods. Note, that the standard is "normal" quality/performance and not "ideal" quality/performance.

c. The car needs to show the quality and performance which are normal in cars of the same type and which the consumer can reasonably expect, given the nature/condition of the car. Therefore, normal wear and tear is determined by the age and condition of the car. Fully rusted parts may constitute a defect, especially if that is why the vehicle cannot be registered for operation in public traffic any more. Yet, in Germany the average total life span of a car is 10 years. At least after eight years, the rust-problem is a significant danger for almost every car in Germany and, therefore, considered to be normal wear and tear.

B. Assurance, Guarantee, Warranty

a. The buyer should ask the seller for specific assurances, express warranties or guarantees if a certain condition is important to him or her. It should all be put down into writing. Maybe a manufacturer's warranty still exists which can be validly assigned to the buyer. Yet, a US manufacture's warranty is probably no good in Europe and vice versa.

b. Not every statement will count as a guarantee, assurance or warranty, *e.g.*, a clause like "inspection guaranteed" means only that the seller has the duty - and the right - to place the car into such a condition that it passes inspection. Moreover, most representations are not intended to cover future defects but are only related to the condition of the car when it is turned over from the seller to the buyer. If your expectations are different, then clearly express it in the contract.

C. Burden of Proof

a. The buyer has the full burden of proof to demonstrate a defect (no wear & tear) and event thereafter, the seller can still argue incompatibility or mistreatment (§ 476 BGB: "...unless... incompatible with the nature of the goods or the nature of the lack of conformity.") but must show full substantial proof thereof.

b. Where the car cannot pass inspection any more without outrageous repair cost, even otherwise irrelevant defects become relevant. After all, every party to a contract expects a fair consideration. Yet, transmission or engine problems are subject to the above-stated rules.

D. Defects: Disclosure and Detection

a. A seller is responsible to inform the buyer of all major accidents and of all major defects, which the seller knows, or which the seller presumes to exist. However, the burden of proof is on the buyer to show the seller failed to obey that duty. If the seller intentionally failed to disclose the defects, he or she may be subject to criminal liability.

b. The buyer should have the car thoroughly checked out and tested before the sale is concluded. The car should be inspected by a trustworthy independent third party, *e.g.*, a garage. Passing inspection is hardly enough proof that the car will remain a reliable one since it does not say anything about the real condition of the car. It just shows that the car is doing fine at that one moment. Use common sense when looking for defects:

- check the full service history to find out maintenance stops and mileage
- a new baffle plate might be there to hide a defective muffler
- check liquid levels and tightness of systems
- uneven worn-out tires suggest bad alignment

- paint film on window rubber or strips may indicate repair of accident damage
- rim flange scratches or spare tire damage proves curb contact leading to consequential damage
- substantial stone chipping to the front area suggests high mileage
- turned on fan or open windows during test drive hide rattling noise or engine noise
- steering wheel judder and pulsating break pedal indicate imbalance or breaking discs problems
- etc.

c. The seller should make his or her intent to sell the used car "as is" and "with all faults" or "Gebraucht wie besichtigt" quite clear and give the buyer a fair chance to verify the condition of the car. That way both sides will know their risks and obligations. Yet, warranties can only be excluded if you're buying from a

E. Return to the USA

a. Where the buyer intends to take the used car back home, he or she should contact vehicle registration, customs and the environment agency first. It is crucial to gather as much information as you can get up front.

b. A car with German specifications can probably not be easily brought into the USA because of different environmental and safety standards. Most likely it would require substantial modifications, *e.g.*, a catalytic converter is a must. Not every German catalytic converter system satisfies the US gas exhaustion standards. Furthermore, German garages are generally not authorized to issue US stickers, even though they may have those stickers on stock.

V. COMPLAINTS

A. USAREUR Solicitation Permit

a. Whenever you order or buy from someone in the housing area or on post you should always ask for that person's USAREUR commercial solicitation permit (AE 210-70E). If the solicitor/salesperson cannot provide such a document, it is suggested you do not do business with them. That person should first register with ICOM-Europe Installation Commercial Affairs Officer (ICAO) or local ICAO IAW AR 210-7 and the Joint Regulation AER 210-70 / USAFE Inst. 211-16, On-Post Solicitation, 05 July 2010. Remember that, buying from a non-USAREUR approved or registered solicitor/salesperson does not constitute grounds for canceling the contract.

b. Authorized agents must have, and present to the person being solicited, a USAREUR Commercial Solicitation Permit booklet (AE Form 210-70E) with a signature of an issuing official. The information inside the booklet will contain the following: agent's name, company, products authorized to sell, photograph, signature of agent and an expiration date. Potential customers should make sure they request to see the agent's permit prior to entering into any business transactions.

c. DoD guidelines prescribe that all solicitors must provide each person solicited an evaluation form that can be completed and turned in to local installation officials. The person being solicited is not required to complete the evaluation; however, completed evaluations should be sent by the person who was solicited to the office designated by the installation commander.

d. Additionally, the solicitor agrees to provide DoD personnel with a written reminder, prior to their making a financial commitment that free legal advice is available from their servicing military legal office.

e. If the solicitor does not have a permit or refuses to show the permit, the customer should notify the local Installation Commercial Affairs Officer (ICAO) whose duty is to protect them from unauthorized or improper solicitation. In the event the Community Affairs Officer is not available, the customer should notify the military police and have the military police report it as unauthorized solicitation. POC for the Army on ICAO issues is the Director, DPTMS on Pulaski Barracks, Bldg. 2933, 2nd floor. He will coordinate actions with Air Force as they are the approving authority with respect to solicitation in housing areas in the KMC.

f. Solicitors are not authorized to approach soldiers, DoD Civilians, or their family members on any installation, government-owned/government leased housing, or barracks areas unless an appointment is made.

g. US Forces military personnel, civilian employees, or their family members should know that the following prohibited activities are the most commonly abused:

- Solicitation in Government or Leased Housing without an appointment, to include door to door solicitation
- Solicitation in dayrooms, troop barracks and billets
- Solicitation of soldiers during duty hours
- Solicitation or presentations to a mass or captive audience; *e.g.*, Soldier's Time
- Solicitation in person or via telephone without prior appointment
- Selling of unauthorized products or services
- Possessing or attempting to possess allotment forms
- Replacement of an existing life insurance policy without a properly prepared comparison statement
- Using official U. S. Forces identification cards or passes to gain access to military installations to solicit

B. Armed Forces Disciplinary Control Board (AFDCB)

a. Any complaints against off-post business may be directed to the Army's Better Business Bureau, called the Armed Forces Disciplinary Control Board (AFDCB) IAW the Joint Regulation AER 190-24 / USAFE Inst. 31-203, Armed Forces Disciplinary Control Board, Europe, and Off-Limits Procedures for Firms Establishments, Organizations, and Areas in the United States European Command, 10 August 2010. The AFDCB is an investigative committee composed of members from each of the services and civilian advisors who seek to protect the interests and welfare of service members when off post. It is designed to investigate and take appropriate action in response to complaints of undesirable business practices against members of the military community.

b. You may complain of unfair business practices and of any other conditions detrimental to your health, safety, or morale to the AFDCB. The AFDCB will investigate these and try to remedy them. If the situation cannot be rectified the business is considered substandard by AFDCB it may be placed off-limits to protect you and other military members.

c. In the KMC, the Air Forces coordinates the off-limits placement. Therefore, you can also contact the 435th Mission Support Group (Ramstein Air Base, Bldg. 2401).

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